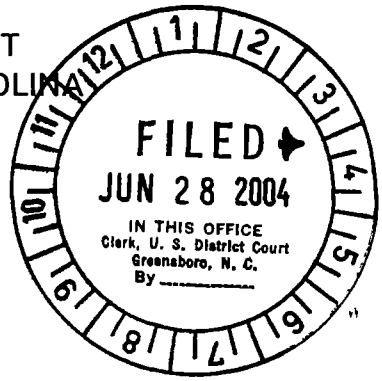
23.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



DAVID L. GUIDER and GUIDER DETAIL, LLC, Plaintiffs,	)	
v.	)	1:04CV00126
THE HERTZ CORPORATION, Rent-a-Car Division, WILLIAM ENGLAND, individually and as an express agent of THE HERTZ CORPORATION, and CHRISTOPHER WARD, Defendants.	)	

MEMORANDUM OPINION

TILLEY, Chief Judge

This action arises out of a written agreement signed by Christopher Ward, professing to be an authorized agent of The Hertz Corporation, and Guider Detail, LLC. Plaintiffs brought suit against Defendants in the Superior Court of Durham County, alleging various state law causes of action arising out of the agreement. Defendants, with the exception of Mr. Ward,[1] removed the action to this Court on the basis of diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs filed a Motion to

[1]Defendants argue that Mr. Ward's consent to removal is unnecessary because he was fraudulently joined in this action. See Fleming v. United Teacher Assocs. Ins. Co., 250 F. Supp. 2d 658, 663 (S.D. W. Va. 2003). Because this case will be remanded for lack of subject matter jurisdiction on other grounds, the issue of Mr. Ward's fraudulent joinder need not be addressed further.

Remand [Doc. # 7]. Defendants, with the exception of Mr. Ward, have filed a Motion to Dismiss [Doc. #10], an Alternative Motion to Sever the Claim against William England [Doc. #14], and a Motion to Transfer [Doc. #12].

For the reasons set forth below, Plaintiffs' Motion to Remand will be GRANTED. Accordingly, Defendants' Motion to Dismiss, Motion to Sever, and Motion to Transfer will all be DENIED.

I.

The facts, in the light most favorable to the Plaintiffs, are as follows. With the exception of The Hertz Corporation ("Hertz"), all parties to this action are citizens of North Carolina. Hertz is a Delaware corporation with its principal place of business in New Jersey. Defendants William England and Christopher Ward were, during the relevant time period, employees of the Hertz used car sales store on Glenwood Avenue in Raleigh, North Carolina ("the Store").

Mr. Ward, while employed as General Manager of the Store, had power of attorney to register and transfer title to Hertz vehicles worth $35,000 or less. Mr. Ward also had the power of attorney to

> "make, execute, deliver and file applications and other instruments in connection therewith; to receive, transfer, and dispose of vehicular certificates of title and registration, license plates, tags, and any and all other documents or indicia of ownership and registration . . . . and to do all other lawful acts necessary or desirable to effectuate the foregoing purposes, all in accordance with the laws, statutes, ordinances, rules and regulations in such cases made and provided . . . ."

On or about January 17, 2003, Mr. Ward entered into an agreement ("the Agreement") with Plaintiff David Guider d/b/a Guider Detail, LLC. The Agreement purported to be a service contract between Hertz and Guider Detail, stating that Mr. Ward was signing as Hertz' attorney-in-fact. Under the terms of the Agreement, Guider Detail would be the exclusive provider of all vehicle detailing services for the Store for a period of seven years. Hertz agreed to pay Guider Detail $275 per vehicle serviced, with a minimum of 100 vehicles to be serviced per month. Guider Detail reserved the right to determine which services needed to be provided for each car. In the event that Hertz violated the terms of the Agreement, Guider Detail would be entitled to receive both injunctive relief and a lump sum payment equivalent to what it would have received had the contract continued for the entire period.

Guider Detail began servicing cars for the Store at a rate of approximately 240 cars per month, and received approximately $375,000 in compensation for these services. On one or more occasions during the time Guider Detail was providing these services, Defendant William England, Service Manager at the Store, accused Guider Detail of "over billing and 'double-dipping.'" Also during this time, Hertz employee Rich Helms began inquiring about the Agreement and about Mr. Guider's employees. Specifically, Mr. Helms was interested in the amount of compensation the employees were receiving from Guider Detail.

On or about September 11, 2003, Hertz asked Guider Detail employees and subcontractors to leave the premises and not return. Hertz fired Mr. Ward the same

day. (Ward Aff. ¶ 20.) At that time, according to the Complaint, Hertz owed Guider Detail approximately $96,525 for work performed. The Plaintiffs allege that Hertz later hired some of Guider Detail's vendors and subcontractors to perform the same duties they had been performing for Guider Detail.

Hertz filed suit against Guider Detail in the United States District Court for the Eastern District of North Carolina[2] on December 23, 2003 ("The Hertz Complaint"), seeking a declaration of rights under the Agreement. Guider Detail received an extension of time in which to file its Answer. On February 2, 2004, before answering the Hertz Complaint, Guider Detail and David Guider brought this action in the Superior Court of Durham County ("the Guider Complaint"). The Guider Complaint alleged breach of contract, unfair and deceptive trade practices, tortious interference with contractual relations, entitlement to quantum meruit, and slander per se. Plaintiffs also sought a temporary restraining order and a preliminary injunction enjoining Defendants from utilizing any other company to provide detailing services. The state court issued a temporary restraining order on February 6, 2004.

Guider Detail filed its Answer to the Hertz Complaint on February 13, 2004, attempting to join William England and Christopher Ward as plaintiffs and to join David Guider as an additional defendant. Guider Detail also asserted that the Hertz Complaint should be dismissed for failure to include Mr. Ward as an indispensable

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[2]Wake County, in the Eastern District, is the location of the Store in question and the site where the Agreement was to be performed.

party whose presence would destroy federal diversity jurisdiction under 28 U.S.C. § 1332. Finally, Guider Detail requested that court to abstain from hearing the case because a dispute was currently pending in state court.[3]

On February 6, 2004, Defendants[4] filed a Notice of Removal of the Guider Complaint in this Court. Plaintiffs filed a Motion to Remand, arguing that this Court does not have jurisdiction because there is not complete diversity among the parties. Defendants have moved to dismiss Plaintiffs' claims against the non-diverse plaintiffs for failure to state a claim. Defendants have also filed an Alternative Motion to Sever the Claims Against William England and a Motion to Transfer this case to the Eastern District of North Carolina.

II.

Before a federal court may address the merits of a case, it must establish that federal jurisdiction is proper. Because removal jurisdiction raises federalism concerns, removal jurisdiction is strictly construed and the burden of establishing federal jurisdiction is on the party seeking removal. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994). "If federal jurisdiction is doubtful, a remand is necessary." Id.

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[3]Although abstention was requested in the Eastern District because of the state court action, the state action had already been removed to this Court.

[4]As previously noted, Defendant Ward did not join in the Notice of Removal.

District courts have jurisdiction over actions between "citizens of different States" when the matter in controversy exceeds $75,000. 28 U.S.C. § 1332(a) (West 1993 & Supp. 2003). The requirement that the controversy be between "citizens of different States" has been interpreted to require complete diversity between the plaintiffs and defendants. See e.g., Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999). In other words, "there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side." City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (internal citations omitted), cited in United States Fidelity & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131, 132-33 (4th Cir. 1995).

Defendants' Notice of Removal, while conceding that Defendants England and Ward are non-diverse, states that this Court has diversity jurisdiction over this matter nonetheless. Defendants maintain that Mr. England and Mr. Ward were improperly joined by the Plaintiffs in an attempt to destroy federal diversity jurisdiction, and that diversity jurisdiction would be proper if the residences of these two fraudulently joined parties were not considered. Specifically, Defendants argue that Mr. England and Mr. Ward were either fraudulently joined or misjoined under the Federal Rules of Civil Procedure. In the alternative, Defendants argue that Mr. England and Mr. Ward are dispensable parties who could be severed from this action.

A.

The Defendants first allege that the slander claim should be dismissed because Mr. England was fraudulently joined. The doctrine of "fraudulent joinder" permits removal of a case despite the fact that a non-diverse party is a defendant. Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999). In essence, a district court may disregard the citizenship of fraudulently joined non-diverse defendants for jurisdictional purposes, dismiss the non-diverse defendants, and thereby retain jurisdiction. Id. In order to establish that a non-diverse defendant has been fraudulently joined, the defendant must establish either: (1) "that there is no possibility that the plaintiff would be able to establish a cause of action against the [non-diverse] defendant in state court;" or (2) "that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993) (citing B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir.1981)).

The parties in the instant case focus on the first test for fraudulent joinder, whether the Plaintiffs have a viable claim against Mr. England. This test is even more favorable to the plaintiff than the standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Hartley v. CSX Transp., Inc., 187 F.3d 422 (4th Cir. 1999). It is a defendant's burden to show that, even when all issues of fact and law are resolved in the plaintiff's favor, the plaintiff cannot establish a claim against the non-diverse defendant. Id. at 232-233. A plaintiff's claims against non-diverse

defendants need not ultimately succeed, the plaintiff need only assert a possible right to relief. Id. at 233 (citing 14A Charles A. Wright et al., Federal Practice & Procedure § 3723, at 353-54 (1985)).

The Plaintiffs allege that they have stated a claim against Mr. England for slander per se. To establish a claim for slander per se in North Carolina, a plaintiff must prove that a false statement was orally communicated to a third person and that the statement amounted to: "(1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." Barker v. Kimberly-Clark Corp., 136 N.C. App. 455, 459, 524 S.E.2d 821, 824 (2000). A finding of slander per se creates a conclusive presumption of legal injury, therefore special damages need not be pled. Id. at 460, 524 S.E.2d at 824-25.

In order for words which impeach one's business reputation to constitute slander per se, they must both "touch the plaintiff in his special trade or occupation," and "contain an imputation necessarily hurtful in its effect on his business." Badame v. Lampke, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955). The North Carolina Supreme Court has found slander per se in statements which "imputed reprehensible conduct" to a plaintiff, "tended to prejudice [a plaintiff's] standing among her fellow workers, stain[ed a plaintiff's] character as an employee . . . , and damage[d a plaintiff's] chances of securing . . . employment in the future." Presnell v. Pell, 298

N.C. 715, 719, 260 S.E.2d 611, 614 (1979). A plaintiff need not plead these statements verbatim, but must allege the statements with sufficient particularity for the Court to determine whether they were defamatory. Andrews v. Elliot, 109 N. C. App. 271, 274, 426 S.E.2d 430, 432 (1993).

Examples of statements that North Carolina courts have found to state claims for slander per se include statements by a school principal that a school cafeteria manager provided alcoholic beverages to cafeteria painters on campus, Id., and statements by an employer to a reporter that a former assistant district attorney was fired for "incompetence, ... Capital I-N-C-O-M-P-E-T-E-N-C-E," and his general failure to "get things done." Clark v. Brown, 99 N.C. App. 255, 258-61, 393 S.E.2d 134, 136-37 (1990). Similarly, a jury instruction for slander per se was proper where a defendant told a professor's colleague that the professor was "a liar, deceitful, absolutely useless, and does not have a Ph.D., and was a fraud." Raymond U. v. Duke Univ., 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988).

Under North Carolina law, general statements that a plaintiff is "dishonest," or that he is "untruthful and an unreliable employee" do not constitute slander per se. Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980). This principle was upheld in one of the North Carolina Court of Appeals' more recent decisions on slander per se in the employment context. Gibson v. Mutual Life Ins. Co. of N.Y., 121 N.C. App. 284, 289, 465 S.E.2d 56, 60 (1996). In Gibson, an employer made negative comments about the plaintiff, a former employee, during a phone

conversation with another former employee. Id. at 288, 465 S.E.2d at 59. The former employee stated the following in an affidavit "[the employer] told me that [the plaintiff] had lied to him and could not be trusted." Id. The North Carolina Court of Appeals found that this statement was not slander per se. Id. at 289, 465 S.E.2d at 60. Similarly, a statement insinuating that workers "were not handling business correctly and . . . [were] doing something 'shady'" was insufficient to survive summary judgment on a claim for slander per se. Long v. Vertical Techs., 113 N.C. App. 598, 603, 439 S.E.2d 797, 801 (1994).

Even if a statement constitutes slander per se, it may not be viable if the speaker held a qualified privilege. A qualified privilege exists when a communication is made:

> (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.

Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994) (citations omitted). Where a qualified privilege is found, the communication in question is presumed to have been made in good faith and without malice. Id. In order to rebut this presumption, a plaintiff must show that the speaker had actual malice. Id.

The sum of the allegations against Mr. England include three paragraphs in the Complaint and two statements in an affidavit attached to the Complaint. The

Complaint includes the following language:

> 20. On several occasions, Defendant England made false slanderous and defamatory statements about Plaintiff in the presence of third parties.
>
> 21. On at least one occasion, Defendant England accused Plaintiffs of over billing and "double-dipping" with regard to their services for Hertz.
>
> 56. Defendants have, without cause or justification, communicated to third parties that Plaintiffs are untrustworthy in their business practices and that they were defrauding Defendant Hertz.

In an affidavit attached to the Complaint, Mr. Ward made the following statements:

> 25. Prior to breaching the Contract with Guider Detail, several of my employees heard Mr. William England, the service manager, make false statements about Mr. Guider to the effect that he and his company were defrauding Hertz and billing more than once for work done on vehicles.
>
> 26. I know this to be a false statement because all work done by Guider Detail had to be inspected and approved by the service manager prior to any payments being made.

It is unclear from the Complaint who heard the statements, the context in which the statements were made, and the exact wording used. Therefore, the facts presently before the Court do not allow a determination of whether Mr. England committed the tort of slander per se and, if so, whether a qualified privilege may exist. Essentially, the Complaint and attached affidavit accuse Mr. England of "over billing and double-dipping" and communicating that the Plaintiffs were "defrauding" Hertz and "untrustworthy." Resolving all issues of fact and law in favor of the Plaintiffs, it cannot be said that there would be no possibility of success against Mr. England and that he was therefore fraudulently joined.

B.

Defendants argue that, even if he was not fraudulently joined, Mr. England should be dismissed because he was misjoined. Claims against a defendant may be dismissed if that defendant was misjoined, that is, not properly joined under the North Carolina Rules of Civil Procedure. Misjoinder of parties is governed by North Carolina Rules of Civil Procedure 20 and 21. Under Rule 21, a court may dismiss a party who has been improperly joined in an action "on such terms as are just." Misjoinder of parties is not a ground for dismissal of the action; instead, the appropriate remedy is severance and dismissal of the misjoined party. See N.C. R. Civ. Pro. 21.

Whether joinder of defendants is proper is governed by Rule 20(a), which provides, in pertinent part:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action.

North Carolina Rule 20(a) is a "close counterpart" of Federal Rule of Civil Procedure 20(a). Woods v. Smith, 297 N.C. 363, 367, 255 S.E. 2d 174, 177 (1979). Proper joinder under Federal Rule of Civil Procedure 20 is examined on a case-by-case basis, and should be "construed in light of its purpose, which 'is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.'" Saval v. BL Ltd., 710 F.2d 1027, 1031 (4th Cir. 1983) (citations omitted).

As to the requirement of common questions, the primary factual issue common to Mr. England and Hertz is the business relationship between the Plaintiffs and Hertz. Mr. England's alleged statement about the Plaintiffs' work is not alleged to be related specifically to any breach of contract by Hertz officials. However, a fair inference from facts alleged in the Complaint is that resolution of the breach of contract claim against Hertz may involve the factual issues upon which the slander claim is based: whether Guider was "double-dipping" or otherwise "defrauding" Hertz. In addition, if it should be determined that the statements were defamatory, not privileged, and made within the scope of Mr. England's employment, Hertz may be vicariously liable. See Denning - Boyles v. WCES, Inc., 123 N.C. App. 409, 414, 473 S.E.2d 38, 41-42 (1996) (citation omitted). Those are determinations which this Court is unable to make at this time.

The claim against Mr. England being neither fraudulent nor misjoined, complete diversity does not exist and the case must be remanded. Accordingly, it is unnecessary to reach any questions of fraudulent joinder or misjoinder relating to Mr. Ward.

III.

Defendants argue, in the alternative, that this Court should dismiss the non-diverse Defendants on the grounds that they are dispensable parties. However, the non-diverse Defendants will not be dismissed on these grounds for the reasons set forth in Lyon v. Centimark Corp., 805 F. Supp. 333, 335 (E.D.N.C. 1992) (finding in

a similar removal situation that even where a non-diverse defendant was "not absolutely essential to the resolution of plaintiff's claim, neither do [the other] defendants have the right to demand [his] dismissal.")

IV.

For the reasons set forth above, Plaintiffs' Motion to Remand will be GRANTED. Defendants' Motion to Dismiss, Motion to Sever the Claim against William England, and Motion to Transfer will all be DENIED as MOOT.

This the 28th day of June, 2004.

United States District Judge